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268 NLRB No. 217

D--1271
Detroit, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE LITTLE CAFE, INC.

and

Case 7--CA--22406

HOTEL, MOTEL, RESTAURANT EMPLOYEES, COOKS AND BARTENDERS UNION, LOCAL 24, OF THE HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL--CIO

DECISION AND ORDER

Upon a charge filed by the Union 26 July 1983, and an amended charge filed on 3 August 1983, the General Counsel of the National Labor Relations Board issued a complaint 1 September 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Company has failed to file an answer.

On 8 November 1983 the General Counsel filed a Motion for Default Summary Judgment. On 17 November 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, ''all the allegations in the Complaint shall be deemed to be admitted true and shall be so found by the Board.'' Further, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Regional Attorney for Region 7, by letter dated 21 October 1983, notified the Company that unless an answer was received immediately, a Motion for Summary Judgment would be filed. The Regional Director for Region 7, in his affidavit dated 8 November 1983, stated that the Respondent failed to file an answer to the complaint. The Respondent filed no response to the Notice to Show Cause.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment.

On the basis of the entire record, the Board makes the following.

Findings of Fact

I. Jurisdiction

The Company, a Michigan corporation, operates a restaurant located at 12601 Gratiot Avenue, Detroit, Michigan. During the fiscal year 1982, a representative period, the Respondent, in the normal course and conduct of its business operation, had gross revenues in excess of $500,000 and purchased liquor valued in excess of $2000 from the Michigan Liquor Control Commission, which obtained said liquor directly from suppliers located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Respondent at its facility located at 12601 Gratiot Avenue, Detroit, Michigan; excluding confidential employees and supervisors as defined in the Act.

Since at least 1969, the Union and the Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective from 1 March 1983 until 28 February 1985, and the Union has been and now is the exclusive collective-bargaining representative of the employees in the unit described above. The collective-bargaining agreement between the Union and the Respondent provides for the withholding of dues from the paychecks of employees and the transmittal of said dues to the Union, pursuant to validly executed dues-checkoff authorizations; for the payment by the Respondent of moneys into various health, welfare, and pension fringe benefit funds; and for the payment by the Respondent of holiday pay to employees. Pursuant to the collective-bargaining agreement, the Respondent agreed to contribute to various health and welfare fringe benefit funds an amount of money sufficient to make each employee eligible for health and welfare benefits and to pay employees holiday pay equivalent to New Year's Day 1983 and Washington's Birthday 1983.

Since on or about 26 January 1983, the Respondent has failed to transmit and/or withhold union dues from employees' paychecks and has failed and refused to make payments into various fringe benefits funds. Since on or about 29 April 1983, the Respondent has failed and refused to pay into the health and welfare funds a sum of money sufficient to make employees again eligible

for health and welfare benefits and to make payment to employees for holiday pay.

Accordingly, we find that the Respondent has, since on or about 26 January 1983, and since on or about 29 April 1983, and at all material times thereafter, refused to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. By failing and refusing since on or about 26 January 1983 to bargain with the Union by failing to transmit and/or withhold union dues from employees' paychecks pursuant to validly executed dues-checkoff authorizations, and by failing and refusing to make payments into various fringe benefit funds; and by failing and refusing since on or about 29 April 1983 to make payment into the health and welfare funds of a sum of money sufficient to make employees again eligible for health and welfare benefits and to pay holiday pay, all as required by the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

2. By the aforesaid conduct, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to apply the terms of the parties' collective-bargaining agreement and to make whole its employees by transmitting any contributions owed by the Respondent to the health and welfare funds and to various fringe benefit funds.[1] In the event that employees incurred expenses due to the Respondent's failure to comply with the contractual provisions noted above, we shall also require that the Respondent reimburse employees for those expenses. We shall further order that the Respondent pay its employees the holiday pay provided for in the collective-bargaining agreement, equivalent to New Year's Day 1983 and Washington's Birthday 1983, and that the Respondent remit to the Union the dues it failed to withhold and/or transmit from employees' paychecks since on or about 26 January 1983. Interest shall be paid in the manner prescribed in Florida Steel Corp., 231 NLRB 651 (1977). See generally Isis Plumbing Co., 138 NLRB 716 (1962).

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[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. Merryweather Optical Co., 240 NLRB 1213 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, The Little Cafe, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, of the Hotel Employees and Restaurant Employees International Union, AFL--CIO, as the exclusive bargaining representative of the employees in the bargaining unit, by failing and refusing to transmit and/or withhold dues from employees' paychecks pursuant to validly executed dues-checkoff authorizations, and by failing and refusing to make payments into the health and welfare and various fringe benefit funds and to pay into the health and welfare funds a sum of money sufficient to make the employees again eligible for health and welfare payments, and by failing and refusing to make payments to employees for holiday pay, all as required by the parties' collective-bargaining agreement. The appropriate unit is:

> All full-time and regular part-time employees employed by the Respondent at its facility located at 12601 Gratiot Avenue, Detroit, Michigan; excluding confidential employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Apply the terms and conditions of the above-described collective-bargaining agreement.

(b) Make the employees in the appropriate unit whole for any losses they may have suffered by reason of the Respondent's unlawful conduct, including

making payments on their behalf to various funds, as required by the collective-bargaining agreement, in the manner set forth in the section of this decision entitled ''The Remedy.''

(c) Post at its facility in Detroit, Michigan, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply herewith.

Dated, Washington, D.C. 29 February 1984

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel, Motel, Restaurant Employees, Cooks and Bartenders Union, Local 24, of the Hotel Employees and Restaurant Employees International Union, AFL--CIO, as the exclusive representative of the employees in the bargaining unit, by failing and refusing to transmit and/or withhold union dues from employees' paychecks pursuant to validly executed dues-checkoff authorizations, to make payments into various fringe benefit funds, to make payments into the health and welfare funds of a sum of money sufficient to make employees again elibible for health and welfare benefits, and to pay holiday pay, all as required by our collective-bargaining agreement with the Union. The appropriate unit is:

> All full-time and regular part-time employees employed by the Respondent at its facility located at 12601 Gratiot Avenue, Detroit, Michigan; excluding confidential employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL apply the terms and conditions of the above-described collective-bargaining agreement to which we are bound.

WE WILL make our employees whole, with interest, for any losses they may have suffered by reason of our failure to apply the terms and conditions of the collective-bargaining agreement referred to above.

THE LITTLE CAFE, INC.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313--226--3244.